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Supreme Court, U. S.
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JUL 2 1975
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In the Supreme Court of the United States

OCTOBER TERM, 1974

HAROLD DURKEE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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HAROLD DURKEE,

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VS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Harold Durkee, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Judgment Below

The order of the Court of Appeals, unpublished per Seventh Circuit Rule 28, is reprinted as Appendix A to this Petition, *infra.*

BLEED THROUGH

Jurisdiction

The judgment of the Court of Appeals was entered on May 28, 1975. Petition for rehearing and suggestion for rehearing in banc (pursuant to F.R.App.P. 35(b) & 40), timely filed, was denied on June 26, 1975. (App. B) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

Questions Presented

1. May conviction for violation of the Hobbs Act (18 U.S.C. 1951) be upheld absent proof that interstate commerce was affected?

2. Was the evidence sufficient to sustain conviction for violation of the Hobbs Act (18 U.S.C. 1951) where the alleged "victim" of the extortion was admittedly engaged both in legitimate trade in jewelry and in illegal transactions—including the purchase and resale of known stolen property, including jewelry, and of contraband (marijuana—absent any evidence proving or even tending to prove that the $350 which the "victim" paid came from any of his legitimately (as opposed to illegally) obtained funds, or that said sum, had it not been paid, would have been used to purchase legitimate merchandise from interstate commerce rather than stolen property or contraband?

3. Upon the facts as stated in question (2) above, did the evidence demonstrate any actual or even realistically probable effect upon that interstate commerce (*i.e.*, legitimate commerce) which the Hobbs Act was designed to protect?

Statute Involved

The Hobbs Act, 18 U.S.C. 1951, provides in pertinent part:

> § 1951. *Interference with commerce by threats or violence*
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

Petitioner, Harold Durkee, was found guilty by a jury[1] of both a substantive and a conspiratorial violation of the Hobbs Act, 18 U.S.C. 1951, arising out of a single alleged extortionate occurrence,[2] as charged in a two-count indictment, 74 CR 15. (R. 1, A. 1-3).[3] The trial court denied

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[1] Petitioner was jointly indicted and tried with two co-defendants, Michael McCarthy and Ronald Uginchus, who were also found guilty as charged. All their convictions were affirmed by the Court of Appeals. (App. A)

[2] Count 1 alleged that on or about September 10, 1973, defendants obstructed, delayed and affected commerce and the movement of jewelry and other articles in commerce, in that they obtained $350 from William Leverence, a jeweler engaged in interstate commerce, with his consent, induced by the wrongful use of fear of economic harm and under color of right, by threatening to use their positions as Chicago police officers to impede, obstruct and prevent carrying on the business of Leverence jewelers unless and until Leverence paid defendants $350, in violation of 18 U.S.C. 1951. Count 2 charged that from September, 1973, and continuing thereafter to the date the indictment was filed, defendants conspired to commit extortion, which extortion would and did obstruct, delay and affect commerce and the movement of jewelry and other articles in commerce, in that defendants would and did wrongfully use their positions as Chicago police officers to unlawfully obtain various sums of money, which money was not due them or the Chicago Police Department, and which money would be and was obtained by defendants from the same William Leverence, with his consent, said consent being induced by fear of economic harm and under color of official right, in violation of 18 U.S.C. 1951. (R. 1, A. 1-3)

[3] "R." refers to the Record on Appeal, "Def. Br." to petitioner's Brief, and "A." to the Appendix to that Brief, all heretofore filed in the Court of Appeals for the Seventh Circuit in cause No. 74-1911; "Tr." refers to the Transcript of Proceedings; and "App. A" to Appendix A to this Petition.

petitioner's motion for judgment of acquittal at the close of the government's case, (A. 3), and denied his post-trial motions as well. (R. 60, 62) Petitioner was sentenced to 9 months imprisonment upon each of the two counts, sentences to run concurrently. (R. 63, A. 4) The Court of Appeals for the Seventh Circuit affirmed. (App. A)

The facts directly pertinent to the questions raised in this petition are as follows:

While it was stipulated that certain of Leverence's inventory for resale in Illinois was obtained from states outside Illinois (R. 55A), there was undisputed evidence that Leverence knowingly was engaged in various illegal enterprises—including purchase of stolen items, including jewelry, for resale, and purchase and resale of marijuana—simultaneous with his legitimate business. (Tr. 10, 30, 35-36, 78, 83, 87, 153, 635, 684-91) There was no evidence as to whether the source of the $350 removed from his office represented money earned from illegal or legal business, or whether, had he not given this sum to the officers, he would have used it for the purchase of legal or illegal property.

Other facts adduced at trial, not essential to an understanding of the issues presented herein, are briefly summarized as Appendix C to this Petition in order to permit the Justices to view the issues presented in the context and factual framework of this particular case as it was actually prepared and tried.

REASONS FOR GRANTING THE WRIT

The evidence was insufficient to sustain conviction, where the alleged "victim" of the extortion was admittedly engaged both in legitimate trade in jewelry and in illegal transactions—including the purchase and resale of known stolen property, including jewelry, and of contraband (marijuana). Therefore, the evidence failed to demonstrate any actual or even realistically probable effect on that interstate commerce which the Hobbs Act (18 U.S.C. 1951) was designed to protect (i.e., legitimate commerce), inasmuch as there was no evidence proving or even tending to prove that the $350 which the "victim" paid came from any of his legitimately (as opposed to illegally) obtained funds, or that said sum, had it not been paid, would have been used to purchase legitimate merchandise from interstate commerce rather than stolen property or contraband. Certiorari should be granted so that this Court may scrutinize the Seventh Circuit's unprecedented extension of the Hobbs Act to reach the instant factual situation, and may speak to a proper construction of that Act.

The statute for violation of which petitioner was convicted, 18 U.S.C. 1951, the Hobbs Act, was designed to protect the channels of interstate commerce from obstruction or interference by robbery or extortion. *Stirone* v. *United States,* 361 U.S. 212, 215, 218 (1960). This Court has been careful strictly to construe the Act, with great deference to maintenance of the delicate state-federal balance. *Enmons* v. *United States,* 410 U.S. 396, 411-12 (1973).

In affirming petitioner's convictions in the case at bar, however, the Seventh Circuit has extended the Hobbs

Act's coverage beyond permissible limits. The instant decision is, we submit, the latest in a series of Seventh Circuit cases stretching the Hobbs Act to and beyond the breaking point. For the Seventh Circuit's most recent pronouncement as to the scope and intended reach of the Hobbs Act prior to the instant decision, see *United States* v. *Staszcuk,* No. 73-1869 (en banc, not yet reported, decided May 16, 1975; original opinion at 502 F.2d 875 (7 Cir. 1975); pet. for cert. filed 6/13/75, No. 74-1579).[4]

Surely Congress had no intent to protect or promote commerce in *illegal* commodities. Yet, by prosecuting and convicting petitioner herein for having violated the Hobbs Act for the conduct demonstrated by this record, the government has done precisely that—that is, it has protected, promoted and condoned the conducting by William Leverence, the alleged "victim," of his various nefarious enterprises.

And by affirming petitioner's convictions in the face of his argument as advanced on appeal[5]—despite unrefuted

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[4] While the en banc opinion in *Staszcuk* gives to the Hobbs Act its broadest possible reading of any published decision to date, even *Staszcuk* does not countenance the result in the case at bar. In *Staszcuk,* a majority of the full court affirmed conviction even though interstate commerce was not in fact affected at all, because plans to build an animal hospital (made possible by rezoning which had been facilitated by an extortionate payment to defendant, an alderman) fell through after the rezoning had been accomplished. Affirmance was based upon evidence that if the plans had been carried out (as had been anticipated at the time of the extortionate payment and the rezoning), commerce would have been affected. (Uncontroverted evidence was adduced that the aborted plans necessarily would have involved use of materials from outside Illinois.) However, nothing in *Staszcuk* suggests a reading of the Hobbs Act as herein, in effect, *promoting illegal commerce.*

[5] Def. Br. Point 1(B), raises the issue presented in this petition.

evidence of Leverence's illegal dealings—the Seventh Circuit has placed its judicial imprimatur on the government's action, the effect of which amounts to promotion of traffic in stolen goods and contraband.

As noted by the court, (App. A, p. 3), it was stipulated that certain of Leverence's legitimate inventory for resale in Illinois was obtained from states outside Illinois. (R. 55A) However, the court completely ignores the thrust of the fact that Leverence admittedly engaged, not only in the legitimate business of reselling lawfully obtained jewelry, but also in various illegal businesses, including the purchase and resale of stolen items, including jewelry, and purchase and resale of marijuana. (Tr. 10, 30, 78, 83, 153, 635, 684-91) Moreover, Leverence's traffic in stolen goods took place at the same location where he also engaged in the legitimate sale of jewelry. (Tr. 687)

The money Leverence testified he gave the officers after they confronted him with his purchase of the lens from Bodie,[6] came from the safe in his place of business. (Tr.

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[6] James Bodie, an admitted "fruit hustler," (*i.e.*, he would rob and extort money and valuables from homosexual men he had "picked up" at the Greyhound Bus Station in Chicago; Tr. 85-86, 238-43), sold the items he thus obtained to "fences" such as Leverence. (Tr. 78) For the past ten years he had regularly sold such stolen merchandise to various persons (Tr. 80-83), including Leverence. (Tr. 10, 35-36, 78, 83). Leverence admittedly knew of Bodie's activities in this regard and knowingly purchased stolen property for resale from him, as well as from others like him. (Tr. 684-91)

The lens which Bodie "sold" to Leverence just before defendants allegedly extorted Leverence was believed by Leverence to have been stolen property. (Tr. 31, 639-49)

For additional facts, see App. C.

653-54) There is not a shred of evidence whether this money was derived from Leverence's lawful business or from his illegal activities, nor whether, had the money not been paid, it would have been used to purchase lawful or illegal items for resale.

On this state of the evidence, it is impossible to find that "commerce" as that term is defined in 18 U.S.C. 1951, and necessarily meaning legitimate commerce, was in any was affected by petitioner's conduct. An actual (or realistically probable[7]) effect on commerce is prerequisite to conviction on either Count, *Stirone* v. *United States,* 361 U.S. 212 (1960), and there is nothing in the evidence from which this necessary element is either proven or properly inferable.

Nonetheless, in an unconscionable over-extension of the Hobbs Act to a point beyond the pale of any legitimate reading of the statute or interpretation of congressional intent, the Seventh Circuit finds that this essential jurisdictional element has satisfactorily been proven. (App. A, p. 3)

The court's reliance on cases involving police extortion of tavern owners, *United States* v. *DeMet,* 486 F.2d 816 (7 Cir. 1973), and *United States* v. *Gill,* 490 F.2d 233 (7 Cir. 1974), (App. A, p. 3), is misplaced, since those cases are not factually in point.

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[7] Per the en banc majority opinion in *Staszuck, supra,* even if there is no actual effect on commerce, the jurisdictional element of the statute is satisfied if there is a showing of a "realistic probability that an extortionate transaction will have some effect on interstate commerce." (No. 73-1869, sl. op. p. 11) But under the facts as adduced in the case at bar, there is not even any showing of "realistic probability." See footnote 4, p. 7, *supra,* and accompanying text.

In *DeMet,* tavern owners were being forced to "pay off" police to prevent being arrested for alleged liquor license violations (*e.g.,* staying open after hours), while in *Gill* the threat was to arrest a tavern owner for illegally having sold liquor to a minor. These situations cannot properly be compared to the case at bar, inasmuch as the violations allegedly being committed by the tavern owners in those cases constituted *malum prohibitum* offenses intimately connected with and directly resulting from the carrying out of the victims' legitimate businesses, while Leverence's purchase of a stolen camera lens from a known "fruit hustler" cannot similarly be characterized. The latter, rather, constitutes a separate and distinct, *malum in se,* illegal act not connected to or resulting from Leverence's legitimate business.

United States v. *Augello,* 451 F.2d 1167 (2 Cir. 1971), also relied on by the court, (App. A, p. 3), is not contrary to petitioner's position herein; for in *Augello,* there was not, as here, the simultaneous carrying out of legal and illegal businesses from the same location. *Augello* thus does not cut against petitioner's argument.

Petitioner's failure to cite any cases directly supporting his position (see App. A, p. 3), is due to the simple fact that this case is factually unique.

In view of the nature of Leverence's various businesses, legitimate and otherwise, and in the absence of any evidence ear-marking the funds paid as either having been derived from or intended for legitimate commerce, petitioner's convictions should be reversed.

• • •

Proper construction of congressional legislation is essential to the orderly administration of justice. Granting certiorari in the instant case would permit this Court to scrutinize the Seventh Circuit's unprecedented extension of the Hobbs Act which permits it to reach the instant factual situation,[8] and would give this Court an excellent opportunity definitively to construe the Act.

Certiorari should be allowed so that the Seventh Circuit's unwarranted interpretation of the Hobbs Act—which permits that Act and the judicial system to be used for the furtherance of illegal enterprise—may not stand as law.

CONCLUSION

To resolve the question herein presented regarding the proper construction of the Hobbs Act—constituting an important issue of federal law which has not been, but should be, decided by this Court—certiorari should be allowed to review the judgment of the Seventh Circuit; and, upon review, petitioner's convictions should be reversed for insufficiency of the evidence.

Respectfully submitted,

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[8] Moreover, it should also be noted that since petitioner's alleged conduct is readily denounceable as criminal by State law, [see Chap. 38, secs. 33-1 (bribery) and 33-3 (official misconduct), Ill. Rev. Stat. 1973], this Court's policy as enunciated in *Enmons* v. *United States*, 410 U.S. 396, 411-12 (1973), militates against such an over-broad reading of the Hobbs Act.